SAS Industries Sdn Bhd & Anor v Perbadanan Kemajuan Negeri Selangor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-500-11 OF 2019
MOHD FIRUZ J
30 OCTOBER 2023

Local Government — Maintenance and repair — Negligence — Claim against agency of State Government ('defendant') — Water kept by defendant in pond by building walls to keep water under control by way of silt traps — Flooding of water into plaintiff's factory premises — Damage and losses — Whether there was improper or no maintenance of silt traps — Whether there was wilful neglect and careless regard to safety and well-being of defendant's neighbours — Whether overflowing of water into plaintiff's premises due to unusual heavy rain — Whether silt traps constructed in proper manner and according to standards set by authorities — Whether doctrine of Rylands v Fletcher applied

Tort — Negligence — Damages — Claim against agency of State Government ('defendant') — Water kept by defendant in pond by building walls to keep water under control by way of silt traps — Flooding of water into plaintiff's factory premises — Damage and losses — Whether there was improper or no maintenance of silt traps — Whether there was wilful neglect and careless regard to safety and well-being of defendant's neighbours — Whether overflowing of water into plaintiff's premises due to unusual heavy rain — Whether situation beyond defendant's control and an 'Act of God' — Whether approval from local authorities for factory to be built on land obtained by plaintiffs — Whether plaintiffs not equipped with requisite license to operate factory business — Whether maxim 'ex turpi causa non oritur actio' applied — Whether silt traps constructed in proper manner and according to standards set by authorities — Whether doctrine of Rylands v Fletcher applied

The plaintiffs were companies which were in the business of processing rubber gloves, disinfecting, packing and trading having their rented factory premises in Serendah, Selangor ('plaintiffs' premises'). The defendant was a Selangor state government agency and the development arm of the Selangor state government. Circa 2016, the defendant was carrying out works on a project ('defendant's project') where water was kept by the defendant in a pond by building walls to keep the water under control by way of silt traps. On the morning of 18 November 2016, the plaintiffs' premises were inundated with water, silt, debris and mud from the silt trap constructed and erected at the defendant's construction site. The sudden flow of water, silt and mud from the

A defendant's construction site into the said plaintiffs' factory, did not permit the plaintiffs time to save or remove their stocks including finished products, machineries, equipment, vehicles and other office/plant accessories and furnishings. It was the plaintiffs' pleaded case, inter alia, that: (a) they suffered various losses and damages due to the flood. This resulted them having to move B out of the factory premises due to the extensive damage to the building, damage to office equipment, machinery, furniture and fittings, vehicle, loss of stocks and loss of business and goodwill; (b) the losses suffered were directly attributable to the gross negligence, wilful neglect and careless regard to the safety and well-being of their neighbours; and in the alternative; and (c) the C defendant did not maintain the silt trap and ponds constructed which led to the ponds containing vast amounts of water that burst the walls due to improper or no maintenance of the silt traps. The plaintiffs' claim against the defendant was fortified by the Majlis Daerah Hulu Selangor ('MDHS') officers who inspected the defendant's site on 8 December 2016 ie about twenty days D after the flood incident. During this inspection, MDHS officers found that the silt traps were not maintained satisfactorily. On the contrary, it was the defendant's contention, inter alia, that: (i) the incident of overflowing water that allegedly entered the plaintiff's premises was due to unusually heavy rain, E a situation beyond the defendant's control and was an 'Act of God'; (ii) the operation of the factory or business at the premises was carried out by the plaintiffs without obtaining the permission, license and approval of the local authorities, especially from the MDHS, as a result of the operation of the plaintiffs without the approval of the MDHS, the premises building built by F the landlord did not have a drain and did not have an adequate and appropriate drainage system to remove the rainwater; (iii) the principle of the case of Ryland v Flether did not apply in favor of the plaintiffs because the 'silt trap' had been built as directed by the relevant authorities and local authorities. The issues that arose for determination were: (A) whether there was extraordinary G rainfall on 18 November 2016 at the defendant's site; (B) whether the defendant was negligent in constructing and maintaining the silt traps; (C) whether the doctrine in *Rylands v Fletcher* was applicable to the present case; and (D) whether the plaintiffs' premise and business operations were tainted with illegality.

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Held, dismissing the claim:

(1) It was incumbent on the court to evaluate which of the two reports ie the Meteorological Department's report ('exh B5') or the Jabatan Pengairan & Saliran ('JPS') report was more accurate. Exhibit B5 report was based I on the data collected at Pusat Pertanian Batang Kali which was situated ten kilometers away from the defendant's project site (as confirmed by the plaintiff's witness (SP2) from the Malaysia Meterological Department). The JPS report, on the other hand, was based on data collected at the Ladang Antara Gapi Station which was located 1.3 kilometers from the

same site. Comparing the distance between the Meteorological Department data collection centre and the JPS data collection to the defendant's project site, based on the 'best evidence rule' the court was inclined to prefer the JPS report that there was heavy rain at the site on 18 November 2016 (see paras 19–21).

(2) The fact that the defendant's silt traps withstood such a heavy rainfall of 104mm on 11 June 2016, showed that the silt traps were constructed in a proper manner and according to standards set by the authorities. Although there was out flow of water from the silt traps at the defendant's project, this could not be equated with a finding that there was failure by the defendant or its contractors to maintain the silt traps satisfactorily. Further, in light of the fact that the plaintiff's witness (SP4) did not conduct the site visit on 8 December 2016 nor 02 March 2017, the court found that the truth of the contents of the notices ie that the defendant's contractors had failed to maintain the silt traps satisfactorily could not be established. The site visits on 8 December 2016 nor 2 March 2017 were approximately 21 days and 104 days respectively from the date of the incident. This delay was unsatisfactory for purposes of proving that the silt traps were maintain unsatisfactorily at the time of the incident. Ipso facto, the evidence adduced by the plaintiffs in support of this issue was wanting (see para 23, 31 & 36–37).

(3) The act of the defendant in building the silt traps to trap surface water, mud and sediment was not based on the defendant's whims and fancy. It was pursuant to a directive by the local authorities, which has legal force. Further, the manner in which the silt traps were build, did not involve a non-natural use of the land as the silt traps were built for the benefit of all parties and the public. Also, the defendant had not artificially introduced on to the land a potentially dangerous substance which was harmful to others and there was no evidence that the method employed by the defendant in constructing the silt traps was unusual and not in accordance with the directives or specifications of the local authorities. Additionally, the defendant could not be blamed for the overflow of the silt traps due to the extraordinary rain fall on 18 November 2016. In the circumstances, the doctrine of *Rylands v Fletcher* was not applicable to the present case (see para 45–47).

(4) There was no evidence of approval from the local authorities for the factory to be built on the land concerned and that the plaintiffs were not in equipped with the requisite license to operate the factory business. All commercial businesses must comply with statutory requirement including the by-laws of the local council. Similarly, all buildings to be erected must obtain approval of the authorities before construction could begin. Based on the facts of the present case, the maxim 'ex turpi cause non oritur actio' (no action can arise from an illegal action) applied

squarely against the plaintiffs herein. It was obvious that the plaintiffs who previously had little regard for the law in the conduct of their business affairs was now coming to the court to seek remedy in the law that they previously disregarded. Such behaviour should be discouraged and could not be condoned in line with public policy (see paras 50 & 58–59).

[Bahasa Malaysia summary

Plaintif adalah syarikat yang menjalankan perniagaan memproses sarung tangan getah, membasmi kuman, membungkus dan berdagang yang mempunyai premis kilang yang disewa di Serendah, Selangor (premis 'plaintif'). Defendan merupakan agensi kerajaan negeri Selangor dan cabang pembangunan kerajaan negeri Selangor. Sekitar 2016, defendan sedang menjalankan kerja-kerja projek ('projek defendan') di mana air disimpan oleh defendan di dalam kolam dengan membina dinding untuk memastikan air terkawal melalui perangkap kelodak. Pada pagi 18 November 2016, premis plaintif telah ditenggelami air, kelodak, serpihan dan lumpur daripada perangkap kelodak yang dibina dan didirikan di tapak pembinaan defendan. Pengaliran mendadak air, kelodak dan lumpur dari tapak pembinaan defendan ke dalam kilang plaintif tersebut, tidak membenarkan masa plaintif untuk menyimpan atau mengalihkan stok mereka termasuk produk siap, mesin, peralatan, kenderaan dan aksesori dan perabot pejabat/loji lain. Ia adalah kes yang diplidkan plaintif, antara lain, bahawa (i) mereka mengalami pelbagai kerugian dan kerosakan akibat banjir. Ini menyebabkan mereka terpaksa berpindah keluar dari premis kilang berikutan kerosakan besar pada bangunan, kerosakan peralatan pejabat, mesin, perabot dan kelengkapan, kenderaan, kehilangan stok dan kehilangan perniagaan dan nama baik; (ii) kerugian yang dialami secara langsung berpunca daripada kecuaian yang teruk, pengabaian yang disengajakan dan kecuaian terhadap keselamatan dan kesejahteraan jiran mereka; dan sebagai alternatif, (iii) defendan tidak menyelenggara perangkap kelodak dan kolam yang dibina yang membawa kepada kolam yang mengandungi sejumlah besar air yang memecahkan dinding akibat penyelenggaraan perangkap kelodak yang tidak betul atau tiada. Tuntutan plaintif terhadap defendan telah diperkukuhkan oleh pegawai Majlis Daerah Hulu Selangor ('MDHS') yang memeriksa tapak defendan pada 8 Disember 2016 iaitu kira-kira dua puluh hari selepas kejadian banjir. Semasa pemeriksaan ini, pegawai MDHS mendapati perangkap kelodak tidak diselenggara dengan memuaskan. Sebaliknya, adalah hujah defendan, antara lain, bahawa (i) kejadian limpahan air yang didakwa memasuki premis plaintif adalah disebabkan oleh hujan lebat yang luar biasa, keadaan di luar kawalan defendan dan merupakan 'Act of God'; (ii) operasi kilang atau perniagaan di premis tersebut telah dijalankan oleh plaintif tanpa mendapat kebenaran, lesen dan kelulusan pihak berkuasa tempatan, terutamanya daripada MDHS, hasil daripada operasi plaintif tanpa kelulusan pihak berkuasa tempatan. MDHS, bangunan premis yang dibina oleh tuan rumah tidak mempunyai longkang

dan tidak mempunyai sistem perparitan yang mencukupi dan sesuai untuk mengeluarkan air hujan; (iii) prinsip kes Ryland v Flether tidak terpakai memihak kepada plaintif kerana 'perangkap kelodak' telah dibina seperti yang diarahkan oleh pihak berkuasa berkaitan dan pihak berkuasa tempatan. Isu-isu yang timbul untuk penentuan adalah (i) sama ada terdapat hujan yang luar biasa pada 18 November 2016 di tapak defendan; (ii) sama ada defendan cuai dalam membina dan menyelenggara perangkap kelodak; (iii) sama ada doktrin dalam *Rylands v Fletcher* boleh digunakan untuk kes semasa; dan (iv) sama ada premis dan operasi perniagaan plaintif telah dicemari dengan menyalahi undang-undang.

Diputuskan, menolak tuntutan:

(1) Ia adalah menjadi tanggungjawab mahkamah untuk menilai yang mana antara dua laporan itu iaitu laporan Jabatan Meteorologi ('ekshibit B5') atau laporan Jabatan Pengairan & Saliran ('JPS') adalah lebih tepat. Laporan eksibit B5 adalah berdasarkan data yang dikumpul di Pusat Pertanian Batang Kali yang terletak sepuluh kilometer dari tapak projek defendan (seperti yang disahkan oleh saksi plaintif (SP2) dari Jabatan Meterologi Malaysia). Laporan JPS pula berdasarkan data yang dikumpul di Stesen Ladang Antara Gapi yang terletak 1.3 kilometer dari tapak sama. Membandingkan jarak antara pusat pengumpulan data Jabatan Meteorologi dan pengumpulan data JPS dengan tapak projek defendan, berdasarkan 'peraturan keterangan terbaik' mahkamah lebih terarah kepada laporan JPS bahawa terdapat hujan lebat di tapak pada 18 November 2016 (lihat perenggan 19–21).

(2) Hakikat bahawa perangkap kelodak defendan menahan taburan hujan selebat 104mm pada 11 Jun 2016, menunjukkan bahawa perangkap kelodak telah dibina dengan cara yang betul dan mengikut piawaian yang ditetapkan oleh pihak berkuasa. Walaupun terdapat aliran keluar air dari perangkap kelodak di projek defendan, ini tidak boleh disamakan dengan dapatan bahawa terdapat kegagalan defendan atau kontraktornya untuk mengekalkan perangkap kelodak dengan memuaskan. Selanjutnya, memandangkan fakta bahawa saksi plaintif (SP4) tidak melakukan lawatan tapak pada 8 Disember 2016 mahupun 02 Mac 2017, mahkamah mendapati kebenaran kandungan notis iaitu kontraktor defendan telah gagal mengekalkannya. perangkap kelodak dengan memuaskan tidak dapat diwujudkan. Lawatan tapak pada 8 Disember 2016 atau 2 Mac 2017 adalah kira-kira 21 hari dan 104 hari masing-masing dari tarikh kejadian. Kelewatan ini adalah tidak memuaskan untuk tujuan membuktikan bahawa perangkap kelodak dikekalkan dengan tidak memuaskan semasa kejadian. Sebenarnya, bukti yang dikemukakan oleh plaintif untuk menyokong isu ini adalah tidak diinginkan (lihat perenggan 23, 31 & 36–37).

(3) Perbuatan defendan membina perangkap kelodak untuk memerangkap air permukaan, lumpur dan mendapan tidak berdasarkan kehendak dan kemahuan defendan. Ia menurut arahan pihak berkuasa tempatan, yang mempunyai kuasa undang-undang. Seterusnya, cara pembinaan perangkap kelodak, tidak melibatkan penggunaan tanah secara bukan semulajadi kerana perangkap kelodak dibina untuk manfaat semua pihak dan orang ramai. Selain itu, defendan tidak memasukkan secara buatan ke atas tanah itu bahan yang berpotensi berbahaya yang memberika kesan buruk kepada orang lain dan tiada bukti bahawa kaedah yang digunakan oleh defendan dalam membina perangkap kelodak adalah luar biasa dan tidak mengikut arahan atau spesifikasi pihak berkuasa tempatan. Selain itu, defendan tidak boleh dipersalahkan atas limpahan perangkap kelodak disebabkan oleh hujan yang luar biasa pada 18 November 2016. Dalam keadaan tersebut, doktrin *Rylands v Fletcher* tidak terpakai untuk kes ini (lihat perenggan 45–47).

(4) Tiada bukti kelulusan daripada pihak berkuasa tempatan untuk kilang itu dibina di atas tanah berkenaan dan plaintif tidak dilengkapi dengan lesen yang diperlukan untuk mengendalikan perniagaan kilang. Semua perniagaan komersial mesti mematuhi keperluan berkanun termasuk undang-undang kecil majlis tempatan. Begitu juga semua bangunan yang hendak didirikan hendaklah mendapat kelulusan pihak berkuasa sebelum pembinaan boleh dimulakan. Berdasarkan fakta kes ini, pepatah 'ex turpi cause non oritur actio' digunakan secara tepat terhadap plaintif di sini. Jelas sekali bahawa plaintif yang sebelum ini tidak mengambil kira undang-undang dalam menjalankan urusan perniagaan mereka kini datang ke mahkamah untuk mendapatkan remedi dalam undang-undang yang sebelum ini mereka abaikan. Tingkah laku sebegini seharusnya tidak digalakkan dan tidak boleh dibiarkan selaras dengan dasar awam (lihat perenggan 50 & 58–59).]

Cases referred to

Golden Wheel Credit Sdn Bhd v Dato' Siah Teong Din [2021] 12 MLJ 589, HC (refd)

National Coal Board v England [1954] AC 403, HL (refd)

Ooi Han Sun & Anor v Bee Hua Meng [1991] 3 MLJ 219, HC (refd)

Pang Mun Chung & Anor v Cheong Huey Charn [2018] 4 MLJ 594, CA (refd)

ParkingEye Ltd v Somerfield Stores Ltd [2013] 2 WLR 939, CA (refd)

Abdul Aziz bin Awang @ Muhammad & Ors v Tenaga Nasional Bhd [2020] 7 MLJ 126, HC (refd)

Chua Kim Suan (administratix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor [1994] 1 MLJ 394, SC (folld)

Glove Kendall Limited & Anor v Maple Challenge Sdn Bhd & Ors and other suits [2016] MLJU 1452, HC (refd)

Hiap Lee (Cheong Leong and Sons) Brickmakers Ltd v Weng Lok Mining

Company Ltd [1974] 2 MLJ 1, PC (refd)
Muhammad Saleh bin Hashim & Ors v Percon Corp Sdn Bhd [2003] 6 MLJ 483, HC (refd)
Patel v Mirza [2016] UKSC 42, SC (refd)
Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 5 MLJ 360, CA (refd)
Rickards v Lothian [1913] AC 263, PC (refd)
Rylands v Fletcher (1968) LR 3 HL 330, HL (distd)
Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors [2000] 4 MLJ 200, HC (refd)
Subramaniam v PP [1956] 1 MLJ 220, PC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)

Legislation referred to

Federal Constitution art 5
Industrial Co-ordination Act 1975 s 3
Streets, Drainage and Building Act 1974 s 70
Undang-Undang Kecil Pelesenan Tred, Perniagaan dan Perindustrian (Majlis Daerah Hulu Langat) 2007 s 3

(Manogar & Co) for the plaintiff.
(Lainah Yaacob & Zulkepli) for the defendant.

Mohd Firuz J:

[1] The following is the court's decision at the end of a full trial between the parties. Trial commenced on 11 August 2022 and concluded on 28 March 2023. In total there were 12 witnesses called, five by the plaintiffs and seven by the defendant.

[2] Having gone through the pleadings of all parties, the evidence adduced at the trial both oral and documentary, and upon reviewing the submissions of counsel, this court had on 24 August 2023 dismissed the plaintiff's claim.

[3] Dissatisfied with the above decision, the plaintiffs have since lodged an appeal against the above decision by way of a notice of appeal dated 22 September 2023 to the Court of Appeal. The following are my grounds of judgment in relation to the said appeal.

FACTUAL MATRIX OF THE PLAINTIFF'S CLAIM

[4] The first and second plaintiffs are family owned companies where the directors and shareholders are all from one family. The companies are in the

business of processing of rubber gloves, disinfecting, packing and trading having their rented factory premises located on Lot 74C, Batu 27, Jalan Besar KL-Ipoh, 48200 Serendah, Selangor ('the plaintiffs' premises').

[5] The defendant is a Selangor state government agency and is the development arm of the Selangor State Government involved in various mixed developments mostly on land owned by them or the state government.

[6] Circa 2016, the defendant was at all material times, through its servants, agents, contractors or workers was carrying out works on a project known as 'Proposed completion of infrastructure works for part of Persiaran Gapi 2 and part of Jalan Antara Gapi 2 in Antara Gapi, Bandar Sungai Chik, Daerah Hulu Selangor' ('the defendant's project'). Water was kept by the defendant in a pond by building walls to keep the water under control by way of silt traps.

[7] On the morning of 18 November 2016 at around 10.30am ('the material time'), the plaintiffs' premises were inundated with water, silt, debris and mud from the silt trap constructed and erected at the defendant's construction site.

[8] At the material time, the plaintiffs' premises were in full operations with about 30 of the plaintiffs' staffs and workers doing their respective jobs. The sudden flow of water, silt and mud from the defendant's construction site into the said plaintiffs' factory, did not permit the plaintiffs time to save or remove their stocks including finished products, machineries, equipment, vehicles and other office/plant accessories and furnishings.

[9] The flow water and mud water rose rapidly to about four feet caused extensive damage to the plaintiffs' premises and properties.

SUMMARY OF THE PLAINTIFFS' PLEADED CASE

[10] It is the plaintiffs' pleaded case that:

(a) they suffered various losses and damages due to the flood. This resulted them having to move out of the factory premises due to the extensive damage to the building, damage to office equipment, machinery, furniture and fittings, vehicle, loss of stocks and loss of business and goodwill;

(b) the losses suffered are directly attributable to the gross negligence, willful neglect and careless regard to the safety and well-being of their neighbours;

(c) further and or in the alternative, the defendant is strictly liable to their neighbours, including the plaintiffs, as not to cause any harm or losses;

(d) the defendant did not maintain the silt trap and ponds constructed by itself, servants or agents and this led to the ponds containing vast amounts of water that burst the walls due to improper or no maintenance of the silt traps;

(e) the defendant knew or ought to have known that if the silt traps are not maintained, it will cause the water, silt and mud to escape or flow out that will cause destruction to the neighbours including the plaintiffs;

(f) the silt trap and pond operated by the defendant was for the defendant's own use or operated for and behalf of the defendant by its servants, agents, contractors and workers in carrying out the said project works for the defendant as the owner and developer of the said project works;

(g) the silt trap/pond built and created by the defendant is for their own use to carry out their works for the purposes of the said project works by the defendant and the accumulation of water into the pond was for a non-natural use for the defendant's own purposes. the defendant had full control of the operations and maintenance of the silt trap and pond as the owner; and

(h) the plaintiffs' claim against the defendant is fortified by the Majlis Daerah Hulu Selangor ('MDHS') officers who inspected the defendant's site on 8 December 2016 ie about 20 days after the flood incident. During this inspection, MDHS officers found that the silt traps were not maintained satisfactorily (see p 54 of bundle B1).

SUMMARY OF THE DEFENDANT'S CASE

[11] The defendant's case can be summarized as follows:

(a) the defendant has appointed Kumpulan Jurutera Perunding ('KJP') to design the infrastructure system for the construction of roads and ditches for the 'Cadangan penyelesaian kerja-kerja infrastruktur untuk sebahagian Persiaran Antara Gapi, Bandar Sungai Chik, Daerah Hulu Selangor ('the project');

(b) KJP has applied for and received approval from the Jabatan Pengairan Dan Saliran Daerah Hulu Selangor for the ground work plan and for roads and drains through a letter dated 13 November 2014. The defendant has also obtained the *kelulusan pelan kerja tanah* from the MDHS through a letter dated 23 March 2015 and the *kelulusan pelan jalan dan parit* from the MDHS dated 4 March 2015;

(c) the defendant has been subject to conditions by the Jabatan Pengairan dan Saliran Daerah Hulu Selangor through a letter of permission dated

13 November 2014 to build a pond and silt trap to be built in the project. MDHS agreed that the water should be drained out through the existing natural stream system. The design of the 'silt trap' has been approved according to the specifications and estimates set by the Jabatan Kerja Raya Malaysia ('JKR');

(d) for the civil works at the project site, the defendant has appointed the company Eminent Ventures Sdn Bhd ('the contractor') to carry out the works at the project site which has been appointed through a tender bid and confirmed through a construction agreement on 11 August 2015 between the defendant and the contractor. The contractor is required to build three 'silt traps' according to the specifications and conditions set by MDHS and Jabatan Pengairan Dan Saliran Hulu Selangor;

(e) the incident of overflowing water that allegedly entered the plaintiff's premises was due to unusually heavy rain and recorded rainfall at the Stesen Ladang Sg Gapi and it was a situation beyond the defendant's control and was an 'act of God';

(f) the defendant states that if there is any rubber glove handling and packaging activity by the plaintiffs, the defendant claims that the operation of the factory or business at the premises is carried out by the plaintiffs without obtaining the permission, license and approval of the local authorities, especially from the MDHS;

(g) as a result of the operation of the plaintiffs without the approval of the MDHS, the premises building built by the landlord does not have a drain and does not have an adequate and appropriate drainage system to remove the rainwater that fell on 18 November 2016 at Stesen Ladang Sg Gapi;

(h) the defendant denied the principle of the case of *Ryland v Flether* applied in favor of the plaintiffs because the 'silt trap' had been built as directed by the relevant authorities and local authorities;

(i) the plaintiffs otherwise conduct business operations at the premises without a license and the plaintiffs even store rubber glove products as legal deposits at the premises without license; and

(j) the plaintiffs cannot rely on the principle of 'res ipsa loquitor' on the facts that have been filed by the defendant who has complied with the conditions of the local authorities with the construction of the 'silt trap' and the overflow of water that occurred on 18 November 2016 was due to unusually heavy rain on the said date.

ISSUES TO BE TRIED

[12] For purposes of the trial, the parties herein had listed the following 14 issues to be tried:

(a) whether the defendant is liable for the works carried out by the contractor Eminent Ventures Sdn Bhd ('EVSB');

(b) whether the contractor EVSB is an independent contractor wherein the defendant is not liable for the works carried out by the said contractor;

(c) whether the defendant is liable for the works carried out by the independent contractor for the said floods;

(d) was the silt trap and water pond involved in this case constructed and maintained according to the specifications by the local authority;

(e) was the flood incident in the plaintiffs' factory premises on 18 November 2016 caused by extraordinary rainfall at the said location;

(f) in the circumstance, where the said flood was caused by extraordinary rainfall, was that an 'act of God' beyond the control of the defendant;

(g) in the circumstance, where the said flood was caused by an 'act of God', is the defendant liable for the losses and damages alleged to have suffered by the plaintiffs as a result of the said flood;

(h) whether the real cause of flood at the plaintiffs premises on 18 November 2016 was due to extraordinary rainfall or the failure of the defendant, the defendant's contractor to maintain the pond/silt trap satisfactorily;

(i) whether the plaintiffs were operating the factory premises without the approval of the authorities in contravention of the law;

(j) in the circumstance, where the plaintiffs were occupying the factory premises without the approval of the local authority, is the defendant liable for all the losses suffered by the plaintiffs as a result of the said flood on 18 November 2016;

(k) in the circumstance, where the plaintiffs were occupying the factory premises that was not constructed in accordance with the law and operating without valid approval, have the plaintiffs a valid cause of action against the defendant liable for all the losses suffered by the plaintiffs as a result of the said flood on 18 November 2016;

(l) is the doctrine of *Rylands v Fletcher* applicable in this case;

(m) is the principle of 'res ipsa loquitor' applicable in this case; and

A (n) in the event the defendant is liable to the plaintiffs for the said flood on 18 November 2016, what are the quantum of damages payable by the defendant to the plaintiffs.

COURT'S FINDINGS AND ANALYSIS

B

[13] Despite the long list of issues to be tried formulated by both parties, I took the view that the case at hand only requires me to consider four issues only, namely:

C (a) whether there was extraordinary rainfall on 18 November 2016 at the defendant's site?

(b) whether the defendant was negligent in constructing and maintaining the silt traps?

D (c) whether the doctrine in *Rylands v Fletcher* is applicable to the present case? And

(d) whether the plaintiffs' premise and business operations are tainted with illegality?

E

[14] My analysis of the above issues are as follows:

Whether there was extraordinary rainfall on 18 November 2016 at the defendant's site?

F

[15] On this issue, the plaintiffs contended that there was no rainfall on 18 November 2016. In support of this contention, the plaintiffs relies on the testimony of Puan Norshahrizan bt Darus ('SP2') from the Malaysia Meterological Department.

G

[16] It was SP2's testimony that based on the records of her department, there was no rain at the location of the defendant's project on 18 November 2016.

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[17] When SP2 was asked to compare the department's report at exh B5 to the report prepared by Jabatan Pengairan & Saliran ('JPS') at bundle B1 p 278, SP2 said that the latter was inaccurate as it does not state the longitude and latitude of the data collection center relied by the defendant.

I

[18] The plaintiffs also contended that the JPS report showed that the rainfall at the location on 18 November 2016 was 86.5mm. The same report also shows that the rainfall at the same location on 11 June 2016 was 104mm.

This is much higher than 86.5mm. Despite this huge difference, there was no flood at the plaintiffs' premises on 11 June 2016. This shows that the JPS report is not true or inaccurate.

[19] In this regard, it is incumbent on this court to evaluate as to which of the two reports ie the Meteorological Department's report (exh B5) or the JPS report is more accurate.

[20] It has to be noted that the exh B5 report is based on the data collected at Pusat Pertanian Batang Kali which is situated ten kilometers away from the defendant's project site (this was confirmed by SP2). The JPS report on the other hand is based on data collected at the Ladang Antara Gapi Station which is located 1.3 km from the same site. Contrary to the plaintiffs' contention that the JPS report suffers from the defect of not having the longitude and latitude details of the JPS data collection center, such details can be found at p 284 of bundle B1.

[21] Comparing the distance between the Meteorological Department data collection center and the JPS data collection to the defendant's project site, based on the 'best evidence rule' this court is incline to prefer the JPS report that there was heavy rain at the site on 18 November 2016.

[22] This court also disagrees with the plaintiffs' contention that the JPS report is inaccurate as the recorded rainfall of 104mm on 11 June 2016 did not cause any flooding to the plaintiffs' premises. This is purely conjecture. In any event, this court cannot place too much emphasis on what transpired on 11 June 2016, as the live issue in the present case is whether there was heavy rainfall on 18 November 2016 and not five months earlier.

[23] To my mind, the fact that the defendant's silt traps withstood such a heavy rainfall of 104mm on 11 June 2016, shows that the silt traps were constructed in a proper manner and according to standards set by the authorities.

Whether the defendant was negligent in constructing and maintaining the silt traps?

[24] At para 25 of the statement of claim, the plaintiff's alleged that the defendant was negligent in maintaining the silt traps built for its project.

[25] In support of this allegation, the plaintiffs relied on the testimony of SP1, SP2, SP4, SD2 and SD3.

A **[26]** SP1 testified that the defendant received information that on the date in question, there was continuous rain resulting in water flowing at a high quantity causing spillage from the silt trap and the surrounding area prepared by the contractor.

B **[27]** SP2 testified that on 18 November 2016, there was no record of rain in the area of Stesen Pusat Pertanian Batang Kali. At the time of checking, the distance from Stesen Pusat Pertanian Batang Kali and the location in dispute is about 10 km.

C **[28]** SP4 then testified, based on their investigations the flooding incident was caused by the failure of the silt traps. In fact, the MDHS had on 15 March 2017 issued a notice of breach to the defendant's contractors for failure to maintain the silt traps satisfactorily. This was as a result of a site visit by MDHS
D officials on 8 December 2016.

[29] The witnesses for the defendant ie SD2 and SD3 also testified that the huge rain fall caused water outflow from the silt trap.

E **[30]** Based on the above, the plaintiffs contended that there is an irresistible conclusion that the silt traps were malfunctioning.

[31] In evaluating this issue, this court agrees with the plaintiffs that there
F was out flow of water from the silt traps at the defendant's project. This however cannot be equated with a finding that there was failure by the defendant or its contractors to maintain the silt traps satisfactorily.

[32] Having reviewed the testimony of both SP1 and SP2, I found that both
G these witnesses had not given evidence that the out flow of the water from the silt traps was due to the failure to maintain the silt traps satisfactorily.

[33] With reference to the testimony of SP4, the site visit on 8 December 2016 and the MDHS notice, this court takes cognizance of the fact that SP4
H did not visit the project site on 8 December 2016. In fact, SP4 had no knowledge of the flooding incident.

[34] This court also takes cognizance of the fact that the report relied upon
I by SP4 was prepared by one, Encik Alfian, who in turn reported the matter to one, Encik Azhar and not to SP4 (see pages 93 & 94 of the notes of proceedings).

[35] Contrary to the plaintiff's contention that the MDHS notice was issued after the site visit on 8 December 2016, it was in fact issued after a site visit by Encik Alfian on 2 March 2017. Encik Alfian was not called as a witness. A

[36] In light of the fact that SP4 did not conduct the site visit on 8 December 2016 nor 2 March 2017, this court finds that the truth of the contents of the notices ie that the defendant's contractors had failed to maintain the silt traps satisfactorily cannot be established (see *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220). B

[37] Based on my calculations, the site visits on 8 December 2016 and 2 March 2017 were approximately 21 days and 104 days respectively from the date of the incident. This delay is unsatisfactory for purposes of proving that the silt traps were maintain unsatisfactorily at the time of the incident. Ipso facto, I take the view that the evidence adduced by the plaintiffs in support of this issue is wanting. C D

Whether the doctrine in Rylands v Fletcher is applicable to the present case?

[38] The plaintiffs in their statement of claim have prayed in addition and/or in the alternative that the defendant is liable under the *Rylands v Fletcher* doctrine of strict liability. E

[39] It is the plaintiffs' pleaded case that the defendant did not manage properly the water that they collected and kept on their premises. This led to water, silt, debris and mud escaping from the defendant's project site and caused loss and damage to the plaintiffs' property. As the water kept was of a non-natural use, the defendant is strictly liable to the plaintiffs without need for the plaintiffs to prove negligence on the part of the defendant (reliance place on the case of *Abdul Aziz bin Awang @ Muhammad & Ors v Tenaga Nasional Bhd* [2020] 7 MLJ 126). F G

[40] At this juncture, perhaps it would be timely for me to state in brief the facts in *Rylands v Fletcher* (1968) LR 3 HL 330 and the principle propounded by Blackburn J in his judgment: H

> [116] The facts in *Rylands v Fletcher* may be stated as follows. There, the defendant had employed contractors to build a reservoir on his land to supply water for his factory. the contractors negligently failed to block a disused mineshaft and when the reservoir was filled to the brim, the plaintiff's adjoining mine was flooded. At first instance, Blackburn J in his judgment, in the court of Exchequer Chamber, aptly said: I
>
> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; an if he does not do so, is prima facie answerable

> for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act of God but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkal works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his own neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.

[41] The above decision was affirmed by the House of Lords subject to the additional requirement that the defendant's use of his land should be non-natural (see *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 5 MLJ 360).

[42] The applicability of the doctrine in *Rylands v Fletcher* requires a plaintiff to proof the following ingredients:

(a) that the defendant had collected and kept on his land a 'thing' that was likely to do mischief;

(b) that the manner in which the 'thing' is put to use was non-natural;

(c) that the 'thing' escaped as a consequence of an act of vis major or an act of God; and

(d) that the defendant could have reasonably foreseen the consequences of the 'thing' causing damage to the plaintiff if it escapes.

[43] In so far as the facts of the present case is concerned, the silt traps located on defendant's project site was built pursuant to legal directive by the JPS and MDHS (see pp 253–254 and 256–259 of bundle B1) for the purpose of trapping the flow of rain water on the earth surface together with mud and sediment in order to prevent the same to flow thru natural waterways such as natural streams and low land areas.

[44] According to SD4, the silt traps were designed based on the requirements under the Urban Storm Water Management Manual of Malaysia chapter 12. It was then constructed in accordance and as per the conditions set by both JPS and MDHS (see pp 253–254 and 256–259 of bundle B1). A

[45] This court is of the view that the act of the defendant in building the silt traps to trap surface water, mud and sediment was not based on the defendant's whims and fancy. It was pursuant to a directive by the local authorities which has legal force. This not a situation where the defendant had collected and kept on his land surface water, mud and sediment in the silt traps for their own purpose. Hence, the first ingredient in *Rylands v Fletcher* is not present. B C

[46] This court also agree with the defendant's following submissions:

(a) that the manner in which the silt traps were build, did not involve a non-natural use of the land as the silt traps were built for the benefit of all parties and the public; D

(b) that the defendant had not artificially introduced on to the land a potentially dangerous substance which was harmful to others;

(c) that there is no evidence that the method employed by the defendant in constructing the silt traps was unusual and not in accordance with the directives or specifications of the local authorities; and E

(d) that the defendant cannot be blamed for the overflow of the silt traps due to the extraordinary rain fall on 18 November 2016. F

See:

(i) *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200;

(ii) *Hiap Lee (Cheong Leong and Sons) Brickmakers Ltd v Weng Lok Mining Company Ltd* [1974] 2 MLJ 1 (PC); and G

(iii) *Rickards v Lothian* [1913] AC 263.

[47] What the above analysis means is that the second ingredient in *Rylands v Fletcher* has also not been met. In the above circumstances, it is this court's considered view that the doctrine of *Rylands v Fletcher* is not applicable to the case at hand. H

Whether the plaintiffs' premise and business operations are tainted with illegality? I

[48] It is an undisputed fact that the premise concerned was rented by the first plaintiff from one, Goo Hung Hing by way of a tenancy agreement dated 1 June 2014.

[49] The second plaintiff was a subtenant of the first plaintiff (there is no evidence that the second plaintiff's occupation to the premise was consented to by the landlord as required under the tenancy agreement).

[50] It is also an undisputed fact that there was no evidence of approval from the local authorities for the factory to be built on the land concerned and that the plaintiffs are not in equipped with the requisite license to operate the factory business.

[51] Under s 70 of the Streets, Drainage and Buildings Act 1974, no building shall be erected without the approval of the local authorities.

[52] Under s 3 of the Industrial Co-ordination Act 1975, no person shall engage in any manufacturing activity without a license being issued for such manufacturing activity.

[53] In so far as the district of Hulu Langat where the plaintiffs' premise is located, s 3 of the Undang-Undang Kecil Pelesenan Tred, Perniagaan dan Perindustrian (Majlis Daerah Hulu Langat) 2007 prohibits the carrying out of any trade activities, business and industry or the use of any premise to conduct such without a license.

[54] The defendant contends that the conduct of the plaintiffs in carrying on its business on the premise that was built without approval from the local authorities and without the requisite licenses to operate is deemed as 'an illegal act' which is contrary to public policy. In such circumstances, the plaintiffs cannot be allowed to maintain an action in tort for matters related to their occupation and business on the premise.

[55] The plaintiffs disagree with the defendant's proposition that they are caught by illegality. For this purpose, the plaintiffs submitted as follows:

(a) they may have operated the factory irregularly not illegally;

(b) the factory was not operating under cover. This is evident from the fact that MDHS had issued the assessment bill for the premises under the category of 'sebuah kilang' or factory. Surely, before categorizing the premise as a factory premise, the said building must have been properly built to be issued with an assessment bill;

(c) the issue of operating the factory without a license is a matter between the plaintiffs and MDHS. As it stands, MDHS has never issued any sum to the plaintiffs to close the factory;

(d) non-compliance of the licensing and business by- laws attracts no penal punishments and cannot be said to be a breach of statute;

(e) in so far as the provisions of the Streets, Drainage and Buildings Act 1974, there is no evidence that the plaintiffs' factory premises was illegally built or a squatter;

(f) the statutory provisions relied by the defendant cannot be used to defeat the plaintiffs' claim as losses caused by the defendant is disproportionate to the offence of operating without a license especially when it is in the evidence that MDHS knew of the plaintiffs' factory operations but did not take the necessary actions (reliance based on *Patel v Mirza* [2016] UKSC 42, *ParkingEye Ltd v Somerfield Stores Ltd* [2013] 2 WLR 939, *National Coal Board v England* [1954] AC 403, *Pang Mun Chung & Anor v Cheong Huey Charn* [2018] 4 MLJ 594, *Golden Wheel Credit Sdn Bhd v Dato' Siah Teong Din* [2021] 12 MLJ 589 and *Ooi Han Sun & Anor v Bee Hua Meng* [1991] 3 MLJ 219); and

(g) the Supreme Court in *Chua Kim Suan (administratix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394, allowed a claim in tort even though the plaintiff there did not have a taxi permit. The Supreme Court then proceeded to allow loss of income from legal earnings but did not allow for loss of income from illegal earnings.

[56] First and foremost, I am compelled to state that the authorities relied upon by the plaintiffs at para 14.4.7 all concerns illegal contracts. They have no applicability to the facts of the present case before this court.

[57] Secondly, in so far as the *Chua Kim Suan (administratix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor*, I find no reason to disagree with the above decision. To my mind, the right to earn a living can be equated to right to life as guaranteed under art 5 of the Federal Constitution (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771).

[58] Thirdly, the right to earn a living is not the same as the right to engage in a commercial business for profit. It is my considered view that all commercial businesses must comply with statutory requirement including the by-laws of the local council. Similarly, all buildings which are to be erected must obtain approval of the authorities before construction can begin. These laws are designed not only to protect the well-being and interest of the public, but also to business owners and dwellers of the building concerns.

[59] Based on the facts of the present case, I am constraint to hold that the maxim 'ex turpi cause non oritur actio' (no action can arise from an illegal action) applies squarely against the plaintiffs herein. It is obvious that the plaintiffs who previously have little regard for the law in the conduct of their

business affairs is now coming to the court to seek remedy in the law that they previously disregarded. Such behavior should be discouraged and cannot be condone in line with public policy as stated in *Muhammad Saleh bin Hashim & Ors v Percon Corp Sdn Bhd* [2003] 6 MLJ 483:

> v. But whether a claim brought is founded in contract or in tort, public policy requires the court to deny its assistance to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal acts. As Best CJ said in *Adamson v Jarvis* (1827) 4 Bing 66, 72–73.

[60] Even if the defendant did not raise the issue of illegality as done in this case for purposes of defeating the plaintiffs' claim, this court can on its own volition raise the issue of illegality when the facts of the case warrants so (refer case of *Glove Kendall Limited & Anor v Maple Challenge Sdn Bhd & Ors and other suits* [2016] MLJU 1452).

[61] Even if I am wrong on to dismiss the plaintiffs' submission on the disproportionality of the losses suffered, I had already formed my conclusion based on the evidence adduced by both parties that the plaintiffs had failed to prove that the failure of the defendant to maintain the silt traps in a satisfactory manner.

COSTS

[62] On the issue of costs of the proceedings, I wish to state that this court is not without empathy to the sufferings of the plaintiffs as a result of the flood incident to its factory premise. Nonetheless, my findings are such that it cannot render assistance to the plaintiffs. In such circumstances and without any intention to disrespect the defendant, this court exercises its discretion not to order any costs as against the plaintiffs.

Claim dismissed.

Reported by K Selvaraju